

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

281 CARE COMMITTEE, RON STOFFEL, Case No.: 0:07-cv-04560
W. I. S. E. CITIZEN COMMITTEE,
VICTOR E. NISKA,

Plaintiffs,

TRANSCRIPT

vs.

OF

RAYMOND R. KRAUSE, JOEL BRUDE,
CITIZENS FOR QUALITY EDUCATION,

PROCEEDINGS

Defendants.

The above-entitled matter came on for hearing
before Judge James M. Rosenbaum, on July 1st, 2008, at the
United States District Courthouse, 300 South Fourth Street,
Minneapolis, Minnesota 55415, commencing at approximately
10:30 a.m.

CALIFORNIA CSR NO.: 8674

ILLINOIS CSR NO.: 084-004202

IOWA CSR NO.: 495

RMR NO.: 065111

APPEARANCES

MOHRMAN & KAARDAL, P.A., 33 South Sixth Street,
Suite 4100, Minneapolis, Minnesota 55402, by ERICK G.
KAARDAL, Attorney at Law, appeared as counsel on behalf of
Plaintiffs.

MINNESOTA ATTORNEY GENERAL'S OFFICE, 445
Minnesota Street, Suite 1800, St. Paul, Minnesota 55101-2134,
by KENNETH E. RASCHKE, Jr., Assistant Minnesota Attorney
General, appeared as counsel on behalf of Defendant, Raymond
R. Krause.

1 LAW CLERK: Your Honor, the matter on the
2 calendar is Civil Case Number 07-4560, 281 Care Committee, et
3 al., versus Raymond R. Krause, Chief Judge.

4 Will counsel please stand and state your
5 appearance.

6 MR. KAARDAL: Good morning, your Honor. My
7 name is Erick Kaardal, from the Mohrman & Kaardal law firm,
8 representing the plaintiffs.

9 THE COURT: Mr. Kaardal, good morning.

10 MR. RASCHKE: I'm Kenneth Raschke, Assistant
11 Minnesota Attorney General. I represent the defendant, Judge
12 Krause.

13 THE COURT: Mr. Raschke, good morning.

14 MR. RASCHKE: Good morning.

15 THE COURT: And who are the two gentlemen in
16 the back?

17 MR. KAARDAL: Your Honor, those are my two
18 oldest sons, Samuel and Leo Kaardal, and they're here to
19 observe the federal court proceedings this morning.

20 THE COURT: Gentlemen, you are welcome. You're
21 very far away. Why don't you come in and you can sit --

22 MR. KAARDAL: You'd better follow the court's
23 order. can they sit at this table, your Honor?

24 THE COURT: Yes. Gentlemen, maybe your father
25 will tell you. You know, you came through that gate, that

1 gate right there. Why don't you tell them what they just
2 did.

3 MR. KAARDAL: You just entered the -- that's
4 the bar and that separates the crowd from the parties and the
5 lawyers. Is that correct, your Honor?

6 THE COURT: And they call that gate -- there is
7 a line like that or a gate in every courtroom and they call
8 it the "bar," and lawyers are called -- or -- are referred to
9 as being "members of the bar" or "admitted to the bar."
10 Normally only lawyers and the parties in the case are allowed
11 to cross the bar. But in this case, gentlemen -- and I'm
12 confident you will behave as gentlemen -- and you will and
13 you are -- you are welcome, and you may be seated inside the
14 bar, but don't ever tell anybody.

15 LEO KAARDAL: Thank you.

16 SAMUEL KAARDAL: Thank you.

17 THE COURT: Counsel, you may proceed.

18 MR. KAARDAL: May it please the court, your
19 Honor --

20 THE COURT: Counsel.

21 MR. KAARDAL: -- this motion is brought by the
22 plaintiffs to certify the class under Rule of Civil Procedure
23 23, and there are two --

24 THE COURT: Mr. Kaardal, why don't you tell me
25 who the plaintiffs are.

1 MR. KAARDAL: The plaintiffs are Victor Niska
2 and his group, W.I.S.E.; Ron Stoffel and his group, 281 Care
3 Committee; and Joel Brude and his citizens' organization.
4 Those are the six plaintiffs in the case.

5 THE COURT: Now, which, if any, of them have
6 faced anything under Minnesota Statute 211B.01(1)?

7 MR. KAARDAL: Mr. Niska and W.I.S.E. were
8 involved in a proceeding in the Office of Administrative
9 Hearings, where, under the procedural rules, OAH determined
10 that there was a prima facie case found on three claims based
11 on their non-defamatory speech. Those proceedings then went
12 to a probable cause hearing. My law firm represented Mr.
13 Niska and W.I.S.E., and the claims were eventually dismissed.

14 THE COURT: So only Mr. Niska, by himself or on
15 behalf of W.I.S.E., had any sort of proceeding and ultimately
16 it was dismissed against him.

17 MR. KAARDAL: Right. And per his affidavit,
18 \$1,900 of attorney fees were incurred in his representation.

19 THE COURT: Okay. Now, the others have not; is
20 that correct?

21 MR. KAARDAL: In the other instances, those are
22 threats. And that's how the case originated.

23 THE COURT: And the lawsuit -- all right. And
24 how am I to notify or find out who the other parties are?

25 MR. KAARDAL: You mean in the proposed class?

1 THE COURT: Yes, sir.

2 MR. KAARDAL: We've identified the class, the
3 "class" being voters in the district who would want the
4 information. And, so, there are two subclasses. I'm talking
5 about the second subclass. And that is, my clients wish to
6 represent voters in the district who want all non-defamatory
7 speech said so they can sort it out themselves; that more
8 political speech is better than less; and charging \$1,900 for
9 a person vindicating his free-speech rights just isn't
10 allowed by the law. And, so, our position is -- and I know
11 that was going to be --

12 THE COURT: So your challenge is, at least
13 ostensibly, a facial challenge to a statute; is that correct?

14 MR. KAARDAL: That's right. And it's not the
15 first time I've made those arguments to this court, your
16 Honor.

17 THE COURT: Now, hold on a minute. I try and
18 ask questions one at a time. Because I can't handle complicated
19 issues, I have to go slow. I'm not familiar with bringing an
20 action against an administrative law judge. Have you seen a
21 facial challenge to a free-speech question by suing an
22 administrative law judge?

23 MR. KAARDAL: No. But this issue was raised
24 before with respect to Judge Noel's ruling and I was at the
25 hearing. And based on the Eighth Circuit case -- the name

1 escapes me for the moment -- oh. It's the St. Paul Area
2 Chamber of Commerce. The U.S. District Court was reversed on
3 a free-speech claim made against a county attorney who was
4 prosecuting under Minnesota's ban -- wasn't prosecuting --
5 but could prosecute under Minnesota's ban on corporate
6 contributions to political causes. And there a jurisdiction
7 was found. And, so, here, analogizing to that case, we sued
8 the likely complainant -- that was the one who had threatened
9 Mr. Mack -- who has now been dismissed -- the Robbinsdale
10 School Superintendant -- and OAH on the theory, "Well, you've
11 got, you know, these two, and they're prosecuting the law.
12 And on the jurisdictional issue, of course, the Office of
13 Administrative Hearings answered. So that wasn't raised to
14 the court at that time. If the court wants to talk about
15 that more --

16 THE COURT: Where, if somebody sues me, the
17 United States Attorney's Office will answer. But I think I
18 have immunity, as long as I'm doing things related to my job.

19 MR. KAARDAL: Well, with respect to the Office
20 of Administrative Hearings, we would assert, your Honor, it
21 is a quasi judicial office and doesn't carry the full
22 judicial means. And beyond that, there are cases where
23 judges have been sued under 1983 and they have been held
24 liable for attorney's fees. Now, I would understand that
25 there's a very high bar that --

1 THE COURT: Let's back up. I mean, this is --
2 there are cases where judges have put people in jail on
3 statutes and offenses which were not jailable. There are
4 cases, as I understand it, where judges have ordered people
5 sterilized. This is a judge who, setting aside the fact that
6 you sued him, did exactly what you wanted, he dismissed the
7 claim against the party. True?

8 MR. KAARDAL: What we exactly wanted is for him
9 to find, in the first instance, under the Constitution --
10 which is just as much law as the law that makes that
11 administrative law judge a judge --

12 THE COURT: Well, the Constitution is more than
13 the law that makes him a judge, I believe. That's the
14 supreme law of the state of Minnesota.

15 MR. KAARDAL: So it was the entertaining of the
16 proceeding which was illegal. I would hope that, you know,
17 if there were illegal proceedings in this courtroom that
18 there would be some remedy of the law to stop an illegal
19 proceeding by injunction or writ of mandamus, or whatever.
20 And, so, here, where the jurisdiction under First Amendment
21 claims is very solid, I think that this qualifies as one of
22 those illegal proceedings. Now, your point being is it a
23 chief judge that --

24 THE COURT: I've got a judge who heard a case,
25 decided it, I think correctly -- at least nobody challenged

1 it -- as opposed to a judge who sterilized somebody or a
2 judge -- you know, a jaywalking offense -- who, for whatever
3 reason, jailed somebody, which is not an incarcerateable
4 offense, those kinds of things are not usually permitted.
5 But I'm not sure where the judge has -- where the judge is a
6 person you want to be suing here.

7 MR. KAARDAL: Well, I think that he's being
8 sued in a --

9 THE COURT: Why don't you give me a cite that
10 tells me that an administrative law judge -- not -- don't
11 give me a prosecutor -- tell me a cite that an administrative
12 law judge has been sued where his actions have been, if you
13 will, precisely what you would have otherwise chosen. Or you
14 can even strike off that last clause.

15 MR. KAARDAL: Could you repeat it without the
16 clause noted, if you could?

17 THE COURT: Sure. A case where an
18 administrative law judge has been sued by way of an attack on
19 a statute.

20 MR. KAARDAL: Okay. I will do that. I can't
21 give it to you now.

22 THE COURT: All right.

23 MR. KAARDAL: But with respect to the point, I
24 think it's fair to respond that there is a unique set of
25 circumstances here that has led to this point. The

1 administrative law judges customarily, as I understand it,
2 serve the administrators. And, so, the administrative law
3 judges makes recommendations to the commissioners, and so
4 forth. They accept them or reject them. They serve under, I
5 guess, federal remedy -- you know, at Article II, Executive
6 Branch. And, so, similarly, that happens at the state level.
7 But here a few years ago, with respect to 221B.06,
8 jurisdiction -- for a hundred years it was the county
9 attorney's responsibility to prosecute violations. And,
10 then, the county attorneys got tired of their responsibility
11 -- my view -- and they lobbied the legislators and this found
12 a home in the Office of Administrative Hearings. And, so,
13 unlike the typical administrative proceedings, this is
14 outside Chapter 14, which is their version of the
15 Administrative Procedures Act, and this operates in a
16 separate area. I'll look for the cite, but I would also like
17 to provide the court with some of the legislative history
18 describing how we got to where we are, because I think that
19 brings it within the scope of the Eighth Circuit decision.

20 THE COURT: You may continue.

21 MR. KAARDAL: And I also want to add to that.
22 The statutes would be a place also to find some support for
23 that. At the end --

24 THE COURT: Which statutes for support for
25 what?

1 MR. KAARDAL: 211B. -- I think it's 44. 211B.
2 The procedures in the Office of Administrative Hearings
3 proceeding include, at the conclusion, possibly a referral to
4 the county attorney. So in my clients' case, we face a
5 triple liability defamation case.

6 THE COURT: But why in the world are you -- my
7 problem -- and for the moment, I will tell you, it's yours --
8 is why are you suing a state judge -- or -- a state
9 administrative law judge? Presumably if you challenge a
10 statute, how do you normally do so? You can either make an
11 attack on a conviction -- which you don't have -- normally or
12 you sue the attorney general of the state of Minnesota, don't
13 you?

14 MR. KAARDAL: I would notify the attorney
15 general. And I guess we can remedy it in our pleadings.
16 That way we will.

17 THE COURT: Well, then a further question, it
18 seems to me that a class action -- I'm just not sure that you
19 need a class action here, either. I mean, this is a
20 strangely pled case, counsel, I will be more than frank.

21 MR. KAARDAL: Well, I think --

22 THE COURT: I mean an attack on a statute is
23 certainly permissible. But I don't know what a class action
24 is here, I really don't. I don't know how I find out who the
25 parties are. I presume everybody is interested in the law

1 and everybody is interested in free speech and, to the best
2 of my knowledge, the United States Constitution protects it.
3 But that having been said, I'm just not sure that this is the
4 way you make the facts that you want to make.

5 MR. KAARDAL: Well, I think that -- well, first
6 of all, I appreciate that. And I'm not the smartest lawyer,
7 but I do --

8 THE COURT: Welcome aboard.

9 MR. KAARDAL: -- I learn from my mistakes. I was
10 before this court before in the Third Congressional District
11 v. Klobuchar and there the claim was related to that my
12 client had said, "I'm the only Republican in the race." So
13 the county attorney prosecuted the claim and Judge Tunheim
14 found jurisdictional problems. One way to address --
15 because, you know, eventually the Eighth Circuit -- because
16 it did -- I believe changed circumstances -- affirmed. And
17 the point being that, you know, with -- that there are
18 doctrines that this court recognizes -- you know, was it
19 capable of repetition that evades review -- and I'm trying to
20 address that. But I -- if the court wanted, I could have
21 additional -- I know committee groups coming forward who have
22 been threatened with these kind of claims. The Orono group
23 certainly would bring one, and others. And, so, I'm getting
24 these calls that this law is a problem, and that when I speak
25 the truth, they see a falsehood and then they sue me. And

1 they don't even need to be harmed because it's about false
2 speech about things, not false speech about people.

3 THE COURT: I've read the statute. I
4 understand what your claim is.

5 MR. KAARDAL: Right.

6 THE COURT: I'm concerned about who your
7 plaintiff is and I'm concerned about who your defendant is
8 and I'm very concerned about whether or not it's a class
9 action.

10 MR. KAARDAL: Right. And, so, my explanation
11 of the class action is that these people themselves have
12 submitted affidavits -- which are unopposed -- that they feel
13 chilled. Even in this case, in the Orono School District,
14 the Orono School District described my plaintiffs in this
15 case as antiprogress. And my clients have testified that
16 they feared, if they went after the school district before
17 the election, that they would have an OAH complaint filed
18 against them. So that was, like, in February. And, so, I
19 believe that there's the jurisdiction. These elections
20 repeat themselves. My clients have demonstrated that their
21 speech has been chilled. And I believe that under Rule 23
22 that we've satisfied the requirement. I guess the court is
23 raising do I have to ascertain the particular members of the
24 class, and I think in this case that -- unlike the Wolfchild
25 case -- I haven't for federal claims -- I spent years

1 ascertaining the members -- it's not necessary to ascertain
2 --

3 THE COURT: But that's an Article I court.
4 This is different.

5 MR. KAARDAL: Okay. In the case of -- okay. I
6 mean, with respect to ascertaining the individual members, I
7 don't think it's necessary because we're not going to issue
8 notice -- we're not proposing that -- and we're not proposing
9 anything more than a declaratory judgment in whatever court's
10 going to --

11 THE COURT: Which gets me back to why don't you
12 just bring a declaratory judgment action or challenge the
13 constitutionality of the state statute? I mean, I still have
14 a very hard time of figuring out why we've got this
15 defendant, I really do.

16 MR. KAARDAL: They're enforcing the law.

17 THE COURT: No, it's the judge. He's
18 adjudicating the law.

19 MR. KAARDAL: That's where the proceedings
20 occurred and that's how we get fined. Well, I guess I feel a
21 little bit --

22 THE COURT: All the -- I mean -- okay.

23 MR. KAARDAL: So I guess using the Eighth
24 Circuit precedent --

25 THE COURT: But the Eighth Circuit precedent is

1 a county attorney. The action is not initiated by the judge
2 who decides the case, is it?

3 MR. KAARDAL: No. The administrative law judge
4 doesn't start the case. Any witness --

5 THE COURT: Who starts it?

6 MR. KAARDAL: In this case, any witness.

7 THE COURT: And who's the plaintiff -- who acts
8 as the plaintiff in the case?

9 MR. KAARDAL: Anybody.

10 THE COURT: But who represents the plaintiff?

11 MR. KAARDAL: In the OAH proceeding?

12 THE COURT: Uh-huh.

13 MR. KAARDAL: It's a puzzle. I mean, when we
14 were up on appeal in Riley v. Jankowski, I challenged all
15 these laws, that they left my client off on a narrower
16 ground. It was a puzzle on what -- how -- who would defend
17 the OAH determination. And OAH ended up defending on the
18 law, and the party -- so OAH was thankful -- was willing to
19 represent based on the facts. But OAH defends generally on
20 appeal, particularly if the complainant won't go forward.
21 There's no way to compel the complainant to defend on appeal.
22 And on the judgment, costs -- after the judgment, costs were
23 assessed. Half the costs were assessed to OAH, half the
24 costs to the complainant. And, so, the court of appeals in
25 the oral argument -- they didn't get the transcript -- said,

1 Well, you don't even have the power to enforce the judgment.
2 How do you get people to pay these if they don't voluntarily
3 pay. So this is the awkwardness of the proceeding. And
4 Riley v. Jankowski covers some of our concerns that I
5 expressed that weren't -- they were ruled on, and here we are
6 today. Now, after --

7 THE COURT: That part I agree with.

8 MR. KAARDAL: Here we are today.

9 THE COURT: Yes, sir.

10 MR. KAARDAL: And, so -- but getting to your
11 point there, I don't think we need to ascertain who the
12 individual members of the class are. I provided some
13 testimony in my affidavit that there are registered voters,
14 the number of registered voters in the different districts.
15 The speech that we're talking about -- every one of these
16 proceedings -- deters speech that these people want because
17 --

18 THE COURT: How is your dad doing so far?

19 LEO KAARDAL: (No verbal response).

20 SAMUEL KAARDAL: (No verbal response).

21 THE COURT: Okay.

22 MR. KAARDAL: And, so -- and I -- the case law
23 does say that we don't need to be as concerned about
24 ascertaining these people when it's a declaratory injunctive
25 action. And I think that with respect to the other factors

1 that we've -- I think we really have met them, the common
2 question of law and fact. I think -- I understand, your
3 Honor, I'm coming in here and I'm saying, "Look, I'm a
4 plaintiff's lawyer, I've used my imagination. I see justice
5 here." Now -- and I understand you're -- "But wait, why
6 should I go along with this guy?" But the point is that I --

7 THE COURT: Hold on a second. You've got to be
8 careful. Only one of us has made a series of declarations;
9 you did in your pleadings. Okay? I'm just the judge.

10 MR. KAARDAL: I understand, your Honor. I
11 understand.

12 THE COURT: I don't have an ax to grind in this
13 case. I'm a judge.

14 MR. KAARDAL: I didn't mean to suggest that,
15 your Honor.

16 THE COURT: Okay.

17 MR. KAARDAL: But what I'm just saying is that,
18 you know, defense lawyers have a job, I have job. My job --

19 THE COURT: But my job is to make sure that if
20 you've got a good claim, you bring it against the right
21 parties and I've got a case to work with. I'm not sure it's
22 crafted that way at this time.

23 MR. KAARDAL: Okay. And that goes back to my
24 point I may not be the smartest lawyer. But nonetheless --

25 THE COURT: But you'll do.

1 MR. KAARDAL: -- I do want -- but I want to say
2 that what I saw was -- when I got the call election night was
3 I then saw, "Well, look, this is a problem statewide. For
4 whatever reason, there's a grassroots movement against these
5 bond referenda and tax referenda and the school districts" --
6 and I have two or three cases here that --

7 THE COURT: Love these laws.

8 MR. KAARDAL: Love these laws. And what I saw
9 was these little guys getting squished with attorneys' fees
10 and quitting as they're -- because they're publishing their
11 stuff at home. And, so, I said, "Well look, there's a
12 statewide problem here with the law. Let's put these people
13 together." And the reason I believe there's a class --
14 there's no other reason -- and I read the rule. And, so --

15 THE COURT: I keep having a bad time, first,
16 with the class. I can live with the class for the moment.
17 The biggest problem is your defendant. You want to enjoin
18 him from being allowed to hear these cases, is that what you
19 want me to do?

20 MR. KAARDAL: Absolutely.

21 THE COURT: Okay.

22 MR. KAARDAL: Why is that? Because innocent
23 people are being charged for their free speech in an
24 administrative case. And if you --

25 THE COURT: You just don't see a lot of cases

1 -- like I said, I have a hard time seeing -- I can handle
2 enjoining judges from adjudicating cases or finding them
3 liable for doing what their job is, even Article I or Article
4 -- or -- hearing -- or -- Executive Branch judges, but -- and
5 I have no case law that supports that, that I'm aware of.
6 That's the reason I keep asking, why in the world don't you
7 bring a case against the attorney general of the state of
8 Minnesota and ask him to defend his law, on some kind of a
9 facial challenge, or something of that type.

10 MR. KAARDAL: Well --

11 THE COURT: But I'm not the lawyer. You're the
12 guy who's done that. You've been to the court of appeals.
13 So far you've come in second is how I think you described it.
14 But that's okay.

15 MR. KAARDAL: The court of appeals proceeding?

16 THE COURT: Yes, sir.

17 MR. KAARDAL: Yeah. I prevailed for my lawyer
18 (sic), but not on the big point.

19 THE COURT: I understand. Well, you also
20 prevailed for your client in this one -- or -- whoever did.

21 MR. KAARDAL: Yeah. But I missed in the OAH
22 proceeding.

23 THE COURT: But you're not getting what you
24 want. What you want is to be not getting prosecuted for
25 expressing opinions that school boards are not happy about.

1 That's what you're looking for, I believe.

2 MR. KAARDAL: Right.

3 THE COURT: Okay. Well, at least I understand
4 where we are. Anything else you want to tell me?

5 MR. KAARDAL: Well, I think that -- well, I
6 guess that I would beg the court leave if I have made -- and
7 I'll provide the cite, if it's there. And if it's not there,
8 that I would have an opportunity before my complaint is
9 dismissed without prejudice, for lack of a good defendant, or
10 whatever, that I have a chance to amend the Complaint to add
11 a proper defendant; otherwise, we'd just have to start --

12 THE COURT: Well, you can sue the state of
13 Minnesota, I think.

14 MR. KAARDAL: Right.

15 THE COURT: I mean it is a party that's
16 commendable to sue, particularly in federal court on
17 constitutional issues.

18 MR. KAARDAL: Right.

19 THE COURT: I mean, once again, I'm not -- I
20 used to be a lawyer. I don't do that anymore.

21 MR. KAARDAL: Right. Well, I appreciate the
22 time, your Honor, and thank you for listening to arguments.

23 THE COURT: Counsel, thank you.

24 Counsel, good morning.

25 MR. RASCHKE: Good morning, your Honor. May it

1 please the court --

2 THE COURT: Counsel, your brother, I have to
3 tell you, has cited a statute with which I had not been
4 familiar, but which I find interesting.

5 MR. RASCHKE: And which statute is that, your
6 Honor?

7 THE COURT: Minnesota Statute 211B.06(1).

8 MR. RASCHKE: Okay. Well --

9 THE COURT: In the realm of political speech,
10 as I understand it, it's a misdemeanor to intentionally
11 participate in an advertisement or other kind of thing which
12 promotes or defeats a question that's false and known to be
13 false. I mean what about -- how about a statement of "This
14 is as a lousy bond issue"? Now, is that a statement that's
15 either true or false?

16 MR. RASCHKE: No, your Honor. The courts of
17 Minnesota, at least, have made it very clear that that
18 statute does not address matters of opinion, only issues of
19 objective fact.

20 THE COURT: Okay. How about "This would be
21 injurious to our community"?

22 MR. RASCHKE: I would say the same. I mean, I
23 would --

24 THE COURT: All right. How about "It is
25 motivated by ill will on the part of the school board"?

1 MR. RASCHKE: I don't think that would be found
2 to be --

3 THE COURT: Well, tell me --

4 MR. RASCHKE: -- a violation.

5 THE COURT: -- what would be. "The chairman of
6 the school board maintains a pornographic Web site"?

7 MR. RASCHKE: That probably wouldn't be a
8 violation unless we were talking about --

9 THE COURT: How about "He's a horse thief"?

10 MR. RASCHKE: -- a person running --

11 THE COURT: How about "He's a horse thief"?

12 MR. RASCHKE: Unless the chairman of the school
13 board was running for office and it was said in the context
14 of his candidacy, that wouldn't be covered. Because the
15 ballot question only talks about false statements of fact
16 concerning the effect of a valid question, if I'm not
17 mistaken. It doesn't address statements about character or
18 motivation of the people that support or don't support the...

19 THE COURT: Okay. "Designs or tends to elect,
20 injure, promote or defeat a candidate for nomination."

21 MR. RASCHKE: "Or..."

22 THE COURT: Yeah. "Or election to a public
23 office or to promote or defeat a valid question that is false
24 and that the person knows is false or communicates to others
25 with reckless disregard of whether it is false." Obviously

1 some people are being prosecuted under this thing.

2 MR. RASCHKE: But I think, if I'm not mistaken
3 -- and I thought I had a copy of that statute here -- and I
4 guess I do in our memo -- that it relates to subdivision one,
5 "false statements with respect to the personal or political
6 character or acts of a candidate" --

7 THE COURT: "The political character of a
8 candidate."

9 MR. RASCHKE: "Character or acts of a candidate
10 or with respect to the effect of a ballot question." So your
11 examples about, you know, impugning the integrity of the
12 president of the school board wouldn't be covered by the
13 statute unless it was in the context of a school board
14 election. And I don't know if that --

15 THE COURT: That's when I think you probably
16 want to run it. Okay. Now, meanwhile, counsel, what are
17 your thoughts respecting whether or not Raymond Krause is a
18 proper defendant in this case?

19 MR. RASCHKE: Oh I would say definitely not.

20 THE COURT: What I meant is that you'd suggest
21 that. But why?

22 MR. RASCHKE: Well, I think --

23 THE COURT: First of all, do they enjoy
24 judicial immunity?

25 MR. RASCHKE: I think they would enjoy quasi

1 judicial immunity, which is very similar to judicial
2 immunity. So that would be --

3 THE COURT: Is that spelled c-r-a-z-y or
4 q-u-a-s-i?

5 MR. RASCHKE: Q-u.

6 THE COURT: All right.

7 MR. RASCHKE: And I -- for the same reason your
8 Honor is sad, that --

9 THE COURT: Is there a case which holds that
10 one in the -- or -- one closely analogous to Raymond L.
11 Krause -- or -- Raymond R. Krause is immune from suit? Your
12 brother tells me he'd like to find one. And do you have one
13 that says that he ain't going to find one?

14 MR. RASCHKE: There's none that come to mind,
15 although I would be fairly confident of saying that I could
16 find one that would say he's immune from suit for damages.
17 Whether it would be utterly immune from suit for declaratory
18 injunctive relief in situations like your Honor posed, where
19 he's acting totally outside the context of his statutory and
20 quasi judicial authority, I --

21 THE COURT: Well, I mean, a judge is also -- I
22 should make it very clear -- if a judge engages in sexually
23 discriminatory conduct respecting her or his staff, that is
24 not -- I mean there's no immunity for that. But I'm talking
25 about when a judge puts on their robe and goes out and works

1 on a law -- I'm not familiar with the fact that you can sue
2 an administrative law judge simply quasi -- he's an
3 administrative law judge rather than a full adjudicating
4 officer.

5 MR. RASCHKE: I don't think you can, your
6 Honor. There may be circumstances in a writ of prohibition,
7 for example, if the court is --

8 THE COURT: Well, this could be by way of his
9 writ of prohibition.

10 MR. RASCHKE: But that would have to be in the
11 context of an individual case that was pending before the
12 judge or before the ALJ. And I think part of the issue here
13 and part of our argument, I guess, against the lawsuit is
14 that Judge Krause --

15 THE COURT: Well, let's assume that they were
16 making either -- they were either making a facial or
17 as-applied challenge, however, to this statute on First
18 Amendment grounds, how would that normally be done?

19 MR. RASCHKE: I think in a lot of cases the
20 plaintiffs have sued a nominal defendant such as the
21 governor. I'm not sure whether the attorney general has been
22 sued in that situation where the attorney general is in
23 charge with responsibility of enforcement.

24 THE COURT: But you sue the state or the
25 governor, or something like that?

1 MR. RASCHKE: They sue the state. Now, the
2 state would be immune from damages but not necessarily immune
3 from injunctive relief.

4 THE COURT: And presumably not immune from
5 having a statute invalidated.

6 MR. RASCHKE: No.

7 THE COURT: All right.

8 MR. RASCHKE: And another way that --

9 THE COURT: Dollar damages don't seem to be a
10 large part of this claim.

11 MR. RASCHKE: No. But another way that it
12 could come up is on appeal from someone who has been punished
13 for having violated this statute. That's the way a lot of
14 these things would arise.

15 THE COURT: And then what you do is you
16 challenge through the state procedure, and then go to the
17 United States Supreme Court on appeal from the state Supreme
18 Court if the state Supreme Court upheld whatever the
19 violation was.

20 MR. RASCHKE: Right.

21 THE COURT: The problem that your brother here
22 suggests, what is it capable of repetition. But more than
23 that, he's got a real problem here. So do you. You've got a
24 ugly statute. It doesn't mean I don't like it, it doesn't
25 mean it's unconstitutional. But for the moment, I'm going to

1 call it ugly. Okay?

2 MR. RASCHKE: Okay.

3 THE COURT: Now --

4 MR. RASCHKE: For the sake of argument.

5 THE COURT: We'll call it for the sake of
6 argument. Now, he being a good lawyer comes up and defends
7 his client, and his client comes in front of Ray Krause and
8 Ray Krause says, "Wait a minute. This is an ugly statute and
9 this guy should not be held liable under it." Now, what is
10 he going to appeal? He's going to appeal from his attorney's
11 fees?

12 MR. RASCHKE: Pardon me?

13 THE COURT: His clients, Mr. Niska and
14 W.I.S.E., went up in front of the -- got the adjudication
15 that they wanted, "Sorry, you're not liable under this
16 statute." Except he said, "Wait a minute, my client's been
17 chilled, because he had to pay \$1,900 worth of attorney's
18 fees." So he won. Now where does he go to get a remedy?
19 As in, don't do me this again.

20 MR. RASCHKE: If that's a valid challenge to a
21 statute, then every statute would be subject to the same
22 challenge.

23 THE COURT: So then he needs to make either a
24 facial or as-applied challenge; correct?

25 MR. RASCHKE: Yes.

1 THE COURT: Okay. And do you think the better
2 way -- is there a better way to do it than suing Ray Krause?

3 MR. RASCHKE: I'm not generally in the business
4 off advising my opponents' clients.

5 THE COURT: No. But you are in the business of
6 -- the attorney general's office is also a servant of the
7 people.

8 MR. RASCHKE: Yes, your Honor.

9 THE COURT: All right. And as an officer of
10 the court and a servant of the people, how do you go about
11 challenging statutes, usually?

12 MR. RASCHKE: Well, one way is to do it within
13 the context of an individual case.

14 THE COURT: Yeah. But the trouble is you keep
15 winning the cases because the law might be ugly.

16 MR. RASCHKE: Well, I mean, you might have to
17 create a statute so that the law doesn't reach the
18 unconstitutional result that they're claiming.

19 THE COURT: Now we write an onerous statute on
20 which people get regularly acquitted and, therefore, we have
21 no problem with the statute because they get acquitted? This
22 argument doesn't go very well.

23 MR. RASCHKE: Well, if the argument against the
24 statute is that it's so broad it would cover all this
25 protected conduct and it turns out that it doesn't, then I

1 think that answers part of the challenge. You know, if I
2 challenge a statute on the ground that it punishes me for
3 telling the truth or for issuing -- or -- for expressing my
4 opinion and somebody charges me with a violation, and I go
5 into court and the court says, "No, it doesn't punish you for
6 that. And we see, you know, what the facts are, and it looks
7 like all you did was express your opinion, even though it was
8 not a very well-founded one, so we're going to throw the case
9 out because we don't think the statute goes that far." That
10 kind of eliminates, at least for that case, any argument that
11 it's invalid because it punishes all this lawful conduct.

12 THE COURT: What about the fact that it costs
13 you 2,000 bucks to get a good lawyer to help you make sure
14 that you don't go to jail for it?

15 MR. RASCHKE: Well, I mean I -- whether or not
16 the person wants to hire a lawyer is kind of up to the
17 person. I mean, a person isn't forced to hire a lawyer, and
18 the lawyer isn't --

19 THE COURT: What about if the person is a wage
20 earner and has to come down to court and his wages -- he
21 don't make wages or he doesn't get his tips because he has to
22 come to court and defend himself against a particularly
23 onerous statute which is -- which he winds up winning?

24 MR. RASCHKE: Well, I expect he wins because
25 the statute isn't as onerous as he thought.

1 THE COURT: But there he lost wages. Now, he
2 didn't lose -- he didn't have to pay attorney fees, but he
3 lost his wages, he lost his hourly, he lost his tips.

4 MR. RASCHKE: Well, instead they pay a lot more
5 to bring a class action.

6 THE COURT: That's their choice.

7 MR. RASCHKE: Well, it's their choice to hire a
8 lawyer. We don't know whether Mr. Niska would have been
9 found in violation if he was there pro se. A lot of the
10 people that come up in the administrative cases involving
11 211B are pro se and --

12 THE COURT: How frequently are we seeing 211B
13 cases? And who does bring the charge against them, the
14 school board?

15 MR. RASCHKE: No. It's any person. I mean an
16 individual can bring the claim. And like Mr. Kaardal said --
17 I mean it used to be that you went to the county attorney and
18 the county attorney was obligated --

19 THE COURT: Declined these things in a
20 heartbeat, I would imagine.

21 MR. RASCHKE: But they couldn't, you see, your
22 Honor, because they were obligated under the statute to
23 pursue it if there was reason to believe there was a
24 violation on pain of losing their job, I think, to -- you
25 know, to prevent, you know, politically motivated sweeping

1 under the rug of campaign violations. And that became fairly
2 onerous on county attorneys who ended up prosecuting people
3 for doing things like giving away donuts at the campaign
4 office.

5 THE COURT: Things of value. I know that. And
6 we've brought those doughnut and match comb dispensers to
7 their knees, as well we should.

8 MR. RASCHKE: One piece of the legislative
9 history is that they have interposed, I guess, the
10 administrative -- the office of administrative hearings to at
11 least kind of preclear these cases before they get dropped in
12 the lap of the county attorney and the ALJ. And the chief
13 ALJ does not, as a rule, decide these cases. But under the
14 statute, the chief administrative law judge assigns to --

15 THE COURT: To one of his deputies.

16 MR. RASCHKE: -- one of the, you know,
17 individual ALJs who will make a preliminary determination as
18 to whether this is even, you know, prima facie allegations of
19 whether it's --

20 THE COURT: A gross misdemeanor -- it's a year
21 in jail on a gross, isn't it?

22 MR. RASCHKE: It can be.

23 THE COURT: Okay. All right.

24 MR. RASCHKE: I don't know anybody that has
25 been under these circumstances.

1 THE COURT: But that's what a gross is. What
2 is it, 10,000 bucks and a year in jail, isn't it? Or is it a
3 thousand?

4 MR. RASCHKE: I'm trying to --

5 THE COURT: I try to avoid them.

6 MR. RASCHKE: Yeah. I think it's 3,000 and a
7 year.

8 THE COURT: Okay.

9 MR. RASCHKE: You can be in jail for a
10 misdemeanor.

11 THE COURT: So you're of a mind that I ought to
12 dismiss this case; is that a fair statement?

13 MR. RASCHKE: Absolutely. And it certainly
14 doesn't pass muster as a class action, your Honor.

15 THE COURT: I thank you.

16 Mr. Kaardal, I'm offering you an option.

17 MR. KAARDAL: Yes, your Honor.

18 THE COURT: You can, if it is your choice,
19 persist in this complaint and this lawsuit.

20 MR. KAARDAL: Yes, your Honor.

21 THE COURT: You may do so and I will make
22 whatever ruling I think appropriate.

23 MR. KAARDAL: Yes, your Honor.

24 THE COURT: You can dismiss this lawsuit,
25 recast it and refile it, and I will order it reported to me

1 and I will take it up -- or -- should you decide to do so.
2 I'm not ordering you to make your decision right now. You
3 may have 48 hours to go check out whether or not you've got a
4 defendant that I ought to have for a defendant in this case,
5 basically whether I have a sustainable lawsuit. And if, at
6 the end of the 48 hours, you think it might be more prudent
7 for you to dismiss it, that's your pleasure. Okay? If you
8 think you want to proceed on this lawsuit the way you've cast
9 it here, I will rule on this lawsuit.

10 MR. KAARDAL: All right.

11 THE COURT: How's that?

12 MR. KAARDAL: That's pretty clear, your Honor.

13 THE COURT: What I'm saying is you've got a
14 free shot -- dismiss it, recast it, I'll take the case back.
15 And if you've got the parties laid out, I'll look at it that
16 way.

17 MR. KAARDAL: All right. I appreciate it. Can
18 I say a couple of comments?

19 THE COURT: Yes, sir.

20 MR. KAARDAL: Because I know -- they're very --
21 just helpful for the court. Because either way, I'm going to
22 have a lawsuit.

23 THE COURT: I didn't say -- I don't say you get
24 to win on either one of them. That's not the question. I
25 don't say you lose on either one of them.

1 MR. KAARDAL: Right. But I just wanted to
2 express my client's determination to continue. On the --
3 just quickly, my review of the statutory history, that it
4 goes back to the founding of the state. And, so, this is
5 very old language. When you look at the published --

6 THE COURT: You know, I bless both of you on
7 this. It's all be or the record. There's nothing in the
8 briefs on that stuff.

9 MR. KAARDAL: That's right. But this is legal
10 -- it will save the court research time.

11 THE COURT: That's what we do here.

12 MR. KAARDAL: That's right. And, then, on the
13 Minnesota -- these are barnacles that I've collected over
14 time and because I've done multiple cases here. But I think
15 it's also relevant the court understanding the case that in
16 the time the county attorney has first jurisdiction over the
17 prosecution that there are, I think, ten published decisions
18 in the court of appeals. No convictions were ever upheld.

19 THE COURT: Which gets me to the question I
20 raised. You've got an onerous statute; everybody gets
21 acquitted under it, but it doesn't mean that we're doing what
22 we ought to be doing here. I can understand the problem.

23 MR. KAARDAL: Then the funnel issue with
24 respect to the claims being brought -- I don't have -- the
25 documentation has never been collected over those hundred

1 years the county attorney has prosecuted. But it is clear
2 from the Web site, the Office of Administrative Hearing, that
3 now there are lots of claims being filed. Now, why is that?
4 Well, the county attorney filtered; and secondly,
5 traditionally, you know, the county -- well, let me put it
6 this way. Defamation actions are limited by the fact only
7 the party injured can bring the civil lawsuit. Here there's
8 no limitation. So if you're a witness to the falsehood, you
9 can bring a claim in OAH. If there's prima facie evidence,
10 it goes. And, so, that's why we're seeing all these claims,
11 because it's accessible to anyone with an ax to grind. You
12 know, "I don't like your views." And, so, that's -- I want
13 to say this because the wealth of data regarding implementing
14 the statute is in the OAH record -- which we've included in
15 my affidavit -- and you had listed a number of scenarios.
16 And, so, with respect to Mr. Niska -- you know, one of the
17 statements that there's a prima facie cause was: "Like most
18 Minnesotans, Howard Lake, we have Waverly taxpayers saw their
19 tax-supported schools shift from property taxes to state
20 income taxes a few years ago." So Mr. Niska said this. And
21 an administrative law judge found under this statute that
22 that was a prima facie violation. He defended himself. But
23 the point is no person was mentioned in that statement. And,
24 so, traditionally, the only exception to the First Amendment
25 was made for things that harm people's reputations and --

1 THE COURT: Mr. Kaardal, I'm going to bring
2 this to a conclusion. I'm not saying you don't have a good
3 lawsuit, I'm not -- but I want -- phrasing the question is,
4 is this the good lawsuit that you want to have?

5 MR. KAARDAL: Understood. Now, I am going to
6 give you one cite before I go.

7 THE COURT: Well, you're not going to do it for
8 very long because I've got to go up to my office.

9 MR. KAARDAL: Okay. The Republican Party of
10 Minnesota v. White --

11 THE COURT: I've heard of the case.

12 MR. KAARDAL: -- those were judge-crafted
13 rules, and we sued the judge's agents.

14 THE COURT: There's a famous statement that
15 "Law is the art of reasoning by false analogy."

16 MR. KAARDAL: Thank you, your Honor

17 THE COURT: We're in recess.

18 THE CLERK: All rise.

19 THE COURT: You have 48 hours. Let your
20 brother know what your choice is, let my staff know what your
21 choice is, please. And if this is the case you want to
22 proceed on, we'll proceed on it.

23 MR. KAARDAL: Thank you, your Honor.

24 THE COURT: I thank you. And if you want, as I
25 said, to rethink about it a little bit, decide whether you've

1 got a defendant who is the defendant you really want to have
2 and a party -- we'll proceed on that one.

3 MR. KAARDAL: All right. Thank you, your
4 Honor.

5 (Court stood in recess at approximately 11:20
6 a.m., on July 1st, 2008).

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2 STATE OF MINNESOTA)

3)ss.

4 COUNTY OF HENNEPIN)
5

6 I, Ronald J. Moen, CSR, RMR, and a Notary Public in
7 and for the County of Hennepin, in the State of Minnesota, do
hereby certify:

8 That the said proceeding was taken before me as a CSR,
RMR, and a Notary Public at the said time and place and was
9 taken down in shorthand writing by me;

10 That said proceeding was thereafter under my direction
transcribed into computer-assisted transcription, and that
11 the foregoing transcript constitutes a full, true and correct
report of the transcript of proceedings which then and there
took place;

12 That I am a disinterested third person to the said
13 action;

14 That the cost of the original has been charged to the
party who ordered the transcript of proceedings, and that all
15 parties who ordered copies have been charged at the same rate
for such copies.

16 That I reported pages 1 through 38,
17

18 IN WITNESS THEREOF, I have hereto subscribed my hand
this 23rd day of January, 2009.
19
20

21 s/Ronald J. Moen
RONALD J. MOEN,
22 CSR, RMR
23
24
25